

City of Detroit

CITY COUNCIL

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TO: The Honorable City Council

FROM: David Whitaker *SW*
David Teeter *DT*
Elizabeth Cabot *EC*

DATE: February 27, 2006

RE: **COMMENTS REGARDING MOST RECENT DRAFT OF THE
MEMORANDUM OF AGREEMENT WITH THE DETROIT ZOOLOGICAL
SOCIETY**

The following are comments from the Research and Analysis Division (RAD) concerning the current draft of the Memorandum of Agreement (MOA) with the Detroit Zoological Society (DZS). Copies of this draft were provided to the City Council and to this Division, Friday afternoon, February 24, 2006.

City Council's issues that remain unresolved from the last version of the MOA are as follows:

- Section 7.5, **Term** of the agreement, provides for a 15-year agreement; several Council Members suggested a maximum of 12 years.
- Section 3.5, **Governance**, does not incorporate Council's suggestion that City Council be provided the authority to appoint two members to the DZS's Board of Directors.

Major Changes in the Current Draft

Section 5.2, **Insurance**: For the 3rd and all successive years, additional language has been added -- the amount of insurance is based upon consultation with Risk Management Council and the parties; the City *expressly agrees* to fund that amount. As the process is currently outlined, no reduction can be made in an appropriation to fund the insurance at the level determined without running afoul of this language.

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Security: The City agrees to appropriate an amount necessary to cover the cost of security—"provided that the city shall consider the Society's ability to pay." This language materially changes the City's obligation as the City is, in the *first instance*, obligated to pay for security of both the City's assets and the DZS's operations as well. If it can be determined, after review of the Society's financial statements, that it has the financial ability to pay these security costs, is the City relieved of its obligation to pay security costs (in whole or in part)? The agreement is silent in this regard.

Section 6.1, Zoological Parks Commission Oversight of Agreement: This section seems to bring this agreement in harmony with the City Charter. The MOA provides that the Zoo Director, in the manner contemplated by 7-1601, runs the Zoo Department whose operation and management is executed by and through this management agreement with DZS. (See for example, the Law Department's written opinion relative to the DIA.) In this regard, section 7.1 should be changed to reflect the continued existence of the Zoo Director's position at the Zoo, *i.e.*, to include an exception for the position of director, which would *not* be eliminated from the payroll. For clarity's sake, references to the Zoo Commission should be preceded by a reference to §7-1602.

Section 7.6, Default: Early Termination: The term default is defined to include a 90 day opportunity to cure that now applies to both parties. Now both parties have a year to cure after notice of default and agree to negotiate a remedy. *If a remedy cannot be agreed upon, the non-defaulting party can terminate and exercise all rights under law.* This is new language but not problematic. There are mutual promises to indemnify, defend, and save each other harmless in the event that there is a default. The City would be entitled to *damages* should the DZS default on its obligations under this agreement. However, in the event of the City's default, the City agrees to refund pledges (unspecified in the agreement and perhaps could total millions of dollars), return membership fees and other contributions, as well as any other available legal remedies. This appears to assume that if the City defaults, the Zoo would be closed.

New language has been added to section 7.6 that would give the DZS the right to unilaterally terminate this agreement early if it determines that it is not *feasible* (an undefined term) to continue to operate the zoo under this agreement upon 1-year notice. The agreement does not provide the City with any recourse should the DZS elect to escape from this agreement, and the City assumes all risk and responsibilities incident to the continued operations of the zoo. The City would bear the cost of shutting the zoo down, and the City would release the DZS from liability incident to a shutdown of operations. It should be noted that it was suggested in previous discussions with the DZS, Law Department and Fiscal Analysis Division that the City should be provided the right to unilaterally terminate the agreement with a one year notice.

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Section 7.12, **Assignment:** The provision that City Council inserted to restrict the DZS from subcontracting rights, obligations, etc., with another governmental entity without Council's written consent is now limited so that it would only apply to funds provided by the City.